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In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY R. MACDONALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 531 F.2d 196. The order of the court of appeals denying the government's petition for rehearing with suggestion for rehearing *en banc* (Pet. App. A) is unreported. The opinion and order of the district court denying respondent's motion to dismiss the indictment (Pet. App. D) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1976, and a petition for rehearing with suggestion for rehearing *en banc* was denied on April 30, 1976. On May 26, 1976, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including June 29, 1976. The petition was filed on that date and was granted on June 20, 1977 (A. 215). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a pretrial order declining to dismiss an indictment on speedy trial grounds may be appealed by the defendant prior to trial.

2. Whether the period after criminal charges against a defendant have been dismissed but before the same or related charges are reinstituted against him should be considered in determining whether the defendant has been deprived of his Sixth Amendment right to a speedy trial.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *.

28 U.S.C. 1291 provides in pertinent part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *.

STATEMENT

Respondent was charged with the first-degree murders of his wife and two daughters, in violation of 18 U.S.C. 1111, in an indictment returned on January 24, 1975, by a grand jury of the United States District Court for the Eastern District of North Carolina. On July 28, 1975, the district court denied respondent's motions to suppress evidence and to dismiss the indictment (Pet. App. 44a-50a). Respondent appealed, and the government moved to dismiss the appeal for lack of jurisdiction. On August 15, 1975 (three days before trial was scheduled to begin), the court of appeals entered an order permitting the appeal and staying respondent's trial (*id.* at 42a-43a). On January 23, 1976, the court of appeals reversed and remanded with directions to dismiss the indictment on the ground that respondent had been denied his Sixth Amendment right to a speedy trial (*id.* at 3a-28a).

1. In the early morning of February 17, 1970, respondent's pregnant wife, Colette, and his two daughters, Kimberly and Kristen, aged five and two, were bludgeoned and stabbed to death at respondent's quarters on the Fort Bragg military reservation in North Carolina. Respondent, a Captain in the Army Medical Corps assigned to the "Green Berets," telephoned the military police at 3:40 a.m. for assistance

(A. 146).[1] Clad only in blue pajama bottoms, respondent informed the police that he and his family had been attacked by four assailants (G-4, at 1), one of whom allegedly chanted, "Acid is groovy, kill the pigs" (A. 185).

Shortly thereafter, Army Criminal Investigation Detachment (C.I.D.) Duty Agent William F. Ivory arrived at the scene as respondent was being removed to the hospital. Agent Ivory walked through the apartment, observing the bodies and the blood stained walls and floors (E-21, at 632-637). He removed a torn and bloody blue pajama top that had been draped on the chest of respondent's wife and a Hilton bathmat that was resting on her abdomen (A. 165). Agent Ivory also observed the word "pig" written in Colette MacDonald's blood on the headboard of the bed in the master bedroom (A. 147; E-21, at 652)[2]

[1] The summarized testimony of the witnesses at the Article 32 hearing convened by the Army to investigate the crimes, prepared by the investigating officer, appears at A. 113-201. The verbatim transcripts are referred to as exhibits E-1 to E-57 in the index to this summary (A. 212-214). References to the verbatim record rather than to the summary will be cited by the pages of the transcript (*e.g.*, E-1, at 5). Government exhibits are referred to by the letter "G" and defense exhibits by the letter "D". These exhibits are indexed at A. 205-211.

[2] The word appeared to have been written by fingers incased in a rubber glove. A finger segment of a latex surgical glove bearing Colette's blood was later recovered from a crumpled sheet in the master bedroom. The second C.I.D. investigation, completed in June 1972 (see p. 11, *infra*), revealed that the finger segment was the same brand as the surgical gloves stored in the cabinet below the sink in respondent's kitchen (A. 165; C.I.D. Report of Investigation No. 71-C.I.D.011-00015, Vol. I, pp. 61-62, Ex. L-2).

and found in the living room a recent issue of *Esquire* magazine, featuring an article on the notorious Charles Manson murders of a few months earlier (G-65; G-85; G-100).

As the body of respondent's wife was being lifted from the floor of the master bedroom onto a stretcher, Agent Ivory noticed a blue thread adhering to a clot of blood on the rug where her head had rested. This discovery prompted a search by C.I.D. personnel for other blue threads and yarns inside and outside respondent's quarters. More than one hundred blue threads and yarns, identical to those of respondent's blue pajama top, were ultimately collected from various rooms and from the area immediately outside the house: more than 70, including approximately 30 from the spot where the body of respondent's wife had been found, were discovered in the master bedroom; 19 were uncovered from the bedding in which Kimberly's body had been wrapped; three were removed from Kristen's bedding; and two were taken from a wooden club lying just outside the utility room door. No threads were found in the living room, where respondent claimed that he had been violently attacked and that his pajama top had been torn (A. 163-166; E-3, at 400; E-21, at 657; G-7; G-20; G-21; G-22; G-24; G-26).

The bodies of respondent's wife and children were immediately autopsied (A. 160-162). Pathologists determined that although Colette and Kimberly had sustained severe blunt trauma injuries to the head before death, all of the victims had died from multiple

deep penetrating stab wounds.[3] It was also determined that respondent and each of the victims had a different blood type, thus facilitating the investigators' recreation of the murders and of respondent's movements through his apartment on the night of the crimes. Furthermore, C.I.D. agents and laboratory technicians engaged in a painstaking analysis of the crime scene over five continuous days, photographing, dusting, and collecting all real evidence found in respondent's quarters (G-98; D-25; D-26; D-27).

Respondent was interviewed by several law enforcement officers on the morning and afternoon following the murders. He reported that at least four intruders had entered his home, that the assailants had encountered him in his living room while he was asleep on the couch and had struck him with a bludgeon, that he had heard his wife and older daughter screaming but had lost consciousness, and that when he awoke he had found his family dead (G-76, at 1-5). Respondent also provided a detailed account of his actions upon discovering the bodies, including the statement that he had removed his pajama top and had covered his wife's body with it and with a Hilton towel (G-76, at 3; G-101, at 4-9).[4]

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[3] Respondent's wife had suffered 16 elliptical stab wounds and 21 puncture wounds to the chest (A. 160).

[4] An ice pick and a paring knife, which had been used to inflict many of the victims' wounds, were recovered from the back yard of the house; there were no fingerprints on either weapon (G-7, at 15). Subsequent analysis showed that a towel had been used to wipe those instruments and that

By April 6, 1970, after an intensive but incomplete investigation had been conducted, it had become apparent to C.I.D. agents that many aspects of respondent's version of the attack and of his actions after regaining consciousness were inconsistent with the preliminary laboratory analysis of the physical evidence. For example, although respondent alleged that he had been stabbed in the right chest, and although he had in fact suffered an incision and a partially collapsed right lung (A. 155),[5] there was no hole in the right front portion of his pajama top to correspond to that wound (G-74); although respondent had not sustained any stab wounds to his back (D-28), more than 30 punctures were visible on the rear panels of his pajama top (G-19); although respondent alleged that he had been violently assaulted in his living room (G-76, at 2; G-101, at 4), no seam threads or fabric yarns from his pajamas were uncovered in a minute, pile-by-pile examination of the living room rug (G-7; E-21, at 661); although respondent alleged that he had been attacked with a wooden club (G-101, at 1), no splinters from the club were found in the living room, despite the fact

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Colette and Kimberly MacDonald's blood was on the towel (G-7, at 6; G.J. Stombaugh 14-17). ("G.J. designates the testimony of the witnesses before the federal grand jury empaneled in August 1974 (see p. 12, *infra*), to which we refer to document the continuing progress of the investigation. We have relied only upon those portions of the grand jury proceedings that have been disclosed to respondent's counsel.

[5] The clean incision suffered by respondent was unlike the multiple, gaping and deeply penetrating knife stab wounds suffered by his wife and children (D-25 to D-28).

that such splinters were discovered in the bedrooms (E-21, at 400), nor was there any trace of blood on the couch, walls, floor or rug in the area of his alleged attack (G-7; G-24; E-8, at 447, 469-470); although respondent alleged that he had not been wearing his pajama top when he inspected Kimberly's body (G-101, at 7), the garment bore stains of Kimberly's blood (G-7); although respondent alleged that his pajama top had been torn in a struggle in the living room (G-101, at 4), the pocket of the pajama top was found near his wife's body in the master bedroom (E-21, at 660) with flecks of Colette's blood on it (G-7); although respondent alleged that he had not been wearing his eyeglasses either when assaulted or at any other time during the attack on his family (G-101), investigators found his glasses lying on the floor of the living room, with Kristen's blood on the surface of the lens touching the floor; and although respondent alleged that he had first discovered his wife's body in the master bedroom, a bare foot print in Colette's blood led from Kristen's room, where other traces of Mrs. MacDonald's blood were found on top of the bed and on an adjacent wall (G-8, at 4).[6]

Based on these and other discrepancies in his story and on additional evidence, respondent was advised of his rights by military authorities on April 6, 1970, and was warned that he was a suspect. Later that day, respondent's immediate commander, Col. Francis

[6] The impression made by the foot matched the dimensions of respondent's left foot (G-8, at 7).

B. Kane, Jr., relieved respondent of his medical duties and restricted him to the military reservation on condition that he be escorted by another officer when not in his quarters. Several weeks thereafter, on May 1, 1970, Col. Kane formally preferred criminal charges against respondent, pursuant to Article 30 of the Uniform Code of Military Justice, 10 U.S.C. 830 (Pet. App. 7a).

As required by Article 32 of the Uniform Code of Military Justice, 10 U.S.C. 832,[7] an Investigating

[7] Article 32, U.C.M.J., 10 U.S.C. 832, provides:

(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel is reasonably available, or by counsel detailed by the officer exercising general court-martial jurisdiction over the command. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

(c) If an investigation of the subject matter of an offense has been conducted before the accused is charged

Officer, Col. Warren V. Rock, was appointed to investigate the matter and to recommend whether the charges (three specifications of murder, in violation of Article 118 of the U.C.M.J., 10 U.S.C. 918) should be referred by the General Court-Martial Convening Authority (the post commander) to a general court-martial for trial. At the hearing held pursuant to Article 32, the government presented 27 witnesses and respondent 29, the majority of whom were character witnesses. Respondent also testified, repeating his previous recollection of the events surrounding the murders (Pet. App. 7a-8a; A. 183-190).

At the conclusion of the Article 32 proceeding, Col. Rock filed a report recommending that the charges against respondent be dismissed but that further investigation of the crime be undertaken by the appropriate civilian authorities (Pet. App. 8a). This recommendation was forwarded to Maj. Gen. Edward M. Flanagan Jr., Commanding General of the unit to which respondent was assigned, who, on Oc-

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with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b), no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.

(d) The requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error.

tober 23, 1970, dismissed the charges because of insufficient evidence available to justify their reference to trial by court-martial (*ibid.*). See *Manual for Courts-Martial, United States* ¶ 33f (Rev. ed. 1969). In December 1970, the Army granted respondent an honorable discharge for reasons of hardship.

2. Following respondent's release from the military, the Department of Justice requested the Army to continue its investigation. During the ensuing year, the C.I.D. conducted a total of 699 interviews or reinterviews in 30 states and several foreign countries (Pet. App. 9a), the vast majority of which were undertaken for the purpose of locating persons who may have been the assailants of respondent and his family (A. 76-77). In addition to following leads furnished by respondent and others, the C.I.D. engaged in numerous forensic tests, including a comprehensive effort to identify all objects found at the scene of the crime (*e.g.*, hairs and fibers, fingerprints, paint, wood, knives, wax). These investigative efforts were recounted in a massive 13-volume report, which was transmitted to the Department of Justice in June 1972.[a] After the report had been examined by several persons within the Department, the C.I.D. was requested to investigate other undeveloped or newly-developed leads. Additional interviews and scientific tests were then conducted and the results incor-

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[a] Contrary to the court of appeals' statement (Pet. App. 9a), the C.I.D. report recommended not respondent's prosecution but rather further investigation (C.I.D. Report, *supra*, at 4, 151-153).

porated into supplemental reports forwarded on November 9, 1972, and August 30, 1973 (Pet. App. 9a).

In late May 1974, after further study, the government determined that many unanswered questions in the complex case could only be resolved by use of the broad investigative powers of the grand jury. Therefore, when its new term commenced in August 1974, a grand jury of the United States District Court for the Eastern District of North Carolina was empaneled to investigate the murders fully. During the next several months, some 75 witnesses, including respondent, were called to testify. At the same time, the Federal Bureau of Investigation undertook an extensive reinvestigation of the crime, which included additional interviews and exhumation of the victims' remains to obtain hair samples.[9]

This renewed investigation led to a number of significant discoveries. It was determined, for example, that when respondent's pajama top was folded in the same manner in which it had been found on Colette MacDonald's body, the puncture holes in the garment corresponded to the ice pick wounds sustained by her chest (G.J. Stombaugh 27-31). In addition, the government learned for the first time that a crumpled and blood-soaked sheet found in the master bedroom near Colette's body bore bloody fabric im-

[9] The grand jurors also inspected respondent's quarters at Fort Bragg, where the murders occurred. These quarters were seized on February 17, 1970, and have remained sealed to this day.

pressions of her pajamas, suggesting that she had been carried while wrapped in the sheet (*id.* at 17-20). The sheet also bore fabric impressions in her blood left by respondent's torn pajama top (*id.* at 19-20). Neither discovery could be reconciled with respondent's repeated assertion that he had been wearing the top of his pajamas throughout the "hippies'" attack on his wife (A. 185-186; G-101, at 4; G.J. MacDonald Vol. II at 62-63, Vol. III at 18-20). In sum, the grand jury's inquiry established that there was probable cause to believe that respondent had killed his family and had staged the murder scene to cover up his crime (Pet. App. 7a, 9a).

3. Respondent was indicted for the murders on January 24, 1975. On July 28, 1975, the district court denied respondent's pretrial motions to dismiss the indictment on several grounds, including double jeopardy, pre-indictment delay, and denial of a speedy trial (Pet. App. 44a-50a).[10] Relying on *United States* v. *Marion*, 404 U.S. 307, the court concluded (*id.* at 49a) that "[t]he right to a speedy trial under the Sixth Amendment does not arise until a person has been 'accused' of a crime, and in this case this did not occur until the indictment had been returned."

[10] On May 30, 1975, the district court also denied respondent's motion for a change of venue to the Central District of California. The court of appeals dismissed respondent's appeal from this order (C.A. 4, No. 75-1621, decided July 1, 1975, certiorari denied, 423 U.S. 926) and denied his petition for a writ of mandamus to compel the district court to grant the change of venue (C.A. 4, No. 75-1681, decided July 15, 1975, certiorari denied, 423 U.S. 927).

The court of appeals, with one judge dissenting, reversed and remanded with directions to dismiss the indictment. Although recognizing that interlocutory orders in criminal cases are generally not appealable, the court, relying upon its decision in *United States* v. *Lansdown*, 460 F.2d 164, held that post-trial consideration of respondent's double jeopardy claim "could provide only inadequate relief because the double jeopardy prohibition was intended to prevent the hardship of undergoing a second trial" (Pet. App. 5a). In addition, the court held that respondent's speedy trial claim was a proper subject for interlocutory review because it involved "a fundamental constitutional right," was "[p]endent to the double jeopardy claim, and closely related to it," and could "be decided without considering the merits of the charges against [respondent]" (*ibid.*).[11]

On the merits, the majority concluded that respondent had been denied his Sixth Amendment right to a speedy trial. The court viewed Col. Kane's preferral of criminal charges against respondent in May 1970, and the contemporaneous restriction of respondent's liberties, as "the functional equivalent of a civilian arrest warrant" (Pet. App. 13a-14a). It

[11] The court also ruled that, in view of its acceptance of the appeal on the double jeopardy and speedy trial issues, it would consider as well the other questions that respondent had sought to appeal (composition of the grand jury, pre-indictment delay, alleged prosecutorial misconduct, discovery, and suppression of evidence), since those questions "if not now presented, might occasion further delay in terminating this litigation" (Pet. App. 4a, n. 3).

concluded that the protections afforded by the Sixth Amendment were activated as of that date and that the delay of more than four and one-half years between respondent's accusation and his indictment was of sufficient length to require application of the balancing analysis outlined in *Barker* v. *Wingo*, 407 U.S. 514 (Pet. App. 13a-20a). Although the court of appeals acknowledged that the government had not deliberately delayed in order to hamper the defense, it nevertheless determined that at least two years of the delay were attributable to "indifference, negligence, or ineptitude" (*id.* at 23a), that respondent had "consistently expressed a desire to have the case resolved" and had "reasonably asserted his right to a speedy trial" (*id.* at 24a), and that respondent had been prejudiced by the delay because he "has had to live with the constant threat of a new prosecution," "has been required to retain counsel at his own expense, and * * * has suffered anxiety concerning the unresolved nature of the case" (*id.* at 25a). Finally, the court stated (without specifying particulars) that "in the five years since the murders, memories have faded and witnesses can no longer be expected to reliably recall details" (*ibid.*).

Judge Craven dissented. He disputed the court's conclusion that respondent had been subjected to the civilian equivalent of an arrest in May 1970, finding that the Army's inquiry fell "somewhere between an unsuccessful presentation to a grand jury and an arrest and subsequent release because of a failure to demonstrate probable cause for the arrest," neither

of which "warrants an application of the sixth amendment's speedy trial guarantee" (Pet. App. 32a). In any event, Judge Craven reasoned, since all military charges against respondent had been dismissed in October 1970, and since respondent had "stood under no 'public accusation'" or other disability during the four-year period prior to his indictment, the majority's conclusion that respondent's right to a speedy trial continued unabated from May 1970 until the return of the indictment was unsupportable (*id.* at 32a-38a).

Judge Craven viewed respondent's claim as one of pre-indictment delay, which he found unpersuasive in the absence of concrete evidence of actual prejudice to respondent (Pet. App. 40a-41a). He noted that it had not been "suggested that any defense witness who knows the truth now cannot be produced, or if found, cannot now remember what he once knew" (*id.* at 41a) and that, in any event, the question of whether prejudice may have resulted from the passage of time between the crime and indictment "[c]ertainly * * * need not be anticipated, and could best be left for determination at trial" (*ibid.*).[12]

SUMMARY OF ARGUMENT

I

The threshold question in this case is whether the order denying respondent's motion to dismiss the in-

[12] On April 30, 1976, the court of appeals denied the government's petition for rehearing *en banc* by a 3-3 vote (Pet. App. 2a).

dictment on speedy trial grounds was appealable before trial. We submit that it was not.

A. Under the controlling jurisdictional statute, 28 U.S.C. 1291, the courts of appeals may review only "final decisions" of the district courts, a phrase that the courts have consistently construed to bar "piecemeal" appeals before final judgment. Indeed, as the Court recently observed in *Abney* v. *United States*, No. 75-6521, decided June 9, 1977, slip op. 5, quoting from *DiBella* v. *United States*, 369 U.S. 121, 126, "[a]dherence to this rule of finality has been particularly stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law.'" The pretrial denial of a defendant's motion to dismiss an indictment on speedy trial grounds is not "final," since it does not terminate the criminal proceedings in the district court; the ruling merely allows the case to proceed to trial, where a number of other factors may lead to dismissal of the charges or where, if the case goes to verdict, the jury may acquit. A speedy trial violation is simply one reason why there should be no judgment of conviction.

B. Nor is the pretrial denial of a speedy trial motion immediately appealable under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547. Although the Court recently applied the "collateral order" doctrine in *Abney* to permit appeal prior to trial of the district

court's rejection of a double jeopardy claim, it stressed that three factors must be met before a departure from the normal rule of finality in criminal cases will be tolerated: the district court's order must constitute a "complete, formal and final rejection" of the defendant's claim, the claim must be wholly "separable from, and collateral to," the principal issue at the defendant's trial, and the claim must involve a right that would be "lost, probably irreparably," if appellate review had to await final judgment. Speedy trial claims satisfy none of these requirements.

Unlike a motion to dismiss an indictment on double jeopardy grounds, which generally raises purely legal questions fully capable of a final resolution before trial, the determination of speedy trial claims requires a delicate assessment of a number of factual issues, the most significant of which is often the prejudice suffered by the defendant on account of the delay. These determinations normally are not possible in advance of trial. Until the government's case has been presented and the precise factual allegations that the defendant must counter are known, the district court cannot intelligently decide whether evidence claimed to have been lost, or witnesses whose memories have allegedly faded, would have materially aided the defense. For these reasons the pretrial denial of a speedy trial motion is always subject to reconsideration during or after trial and can never be considered a final rejection of the claim.

Speedy trial claims also implicate matters that are not wholly separable from the merits of the impending trial. The thrust of a defendant's Sixth Amendment contention in the usual case is that the passage of time has frustrated his ability to establish his innocence of the crimes charged. Only after the trial has taken place is this assertion truly meaningful: not only is an assessment of prejudice more easily accomplished at that stage, but also, if the jury acquits, it is apparent that the defendant has not been prejudiced at all.

Finally, and of most importance, there is no justification for allowing an exception to the beneficial rule against piecemeal appeals in criminal cases for speedy trial claims, because such claims can be fully adjudicated after trial. By contrast to the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not encompass a "right not to be tried," which must be upheld prior to trial if it is to be enjoyed at all. It is the delay *before* trial, not the trial itself, that offends the constitutional guarantee of a speedy trial. Thus, proceeding with the trial after a defendant's Sixth Amendment claim has been rejected by the district court would not cause or compound the deprivation, and the constitutional protection can be completely vindicated by the reversal of any conviction procured after a period of unconstitutional delay.

C. Perhaps occasional delay might seem an acceptable price to pay for ensuring the expeditious resolution of valid speedy trial claims. Common sense in-

dicates, however, that the district courts properly resolve the vast majority of such claims. Hence, the price for correcting a relatively few errors before trial would be delay in the overwhelming number of cases in which defendants have appealed from correct decisions—and it would be the rare defendant, interested in postponing his trial for tactical reasons, who could not fashion a colorable speedy trial argument. Moreover, some assertions of delay-caused prejudice to a defendant, validly rejected when first presented, would become self-fulfilling prophecies as memories dim or evidence is lost during the period necessary for review.

This result would seriously frustrate the goal that the Speedy Trial Clause is designed to achieve—the prompt disposition of criminal charges—a goal that is as much designed to foster the interests of society as to confer protection upon individual defendants. The prudent course, therefore, is to minimize pretrial delay by requiring a defendant whose speedy trial motion has been denied by the district court to proceed to trial, not to encourage further delay by countenancing protracted interlocutory appeals.

II

If the Court concludes that the denial of respondent's speedy trial motion was properly appealable prior to trial, then the judgment of the court of appeals must be reversed on the merits. The Court's holding that respondent was denied his Sixth Amendment right to a speedy trial rests on the erroneous

assumption that the protections afforded by the Speedy Trial Clause continue to run after charges against a defendant have been dismissed. We submit that an extension of the Sixth Amendment to the period during which an individual is no longer the subject of public accusation is both unwarranted and unwise.

A. This Court has observed on several occasions that only "a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge * * * engage the particular protections" of the Speedy Trial Clause. *United States* v. *Marion*, 404 U.S. 307, 320. See also *United States* v. *Lovasco*, No. 75-1844, decided June 9, 1977, slip op. 5. This is true because a person who has been formally accused of a crime has a substantial interest in an expeditious disposition of the charges.

Inordinate delay between accusation and trial may prejudice the accused's ability to mount a successful defense. Moreover, "[a]rrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends." *United States* v. *Marion*, *supra*, 404 U.S. at 320. Once the government has set the criminal process in motion, with these inevitable consequences, it assumes a duty, imposed by the Sixth Amendment, to bring the accused to trial with a minimum of delay.

These considerations have little application to a period during which no formal criminal charges ex-

ist. While not under arrest or indictment, "a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer." *United States* v. *Marion*, *supra*, 404 U.S. at 321. Moreover, the government obviously cannot be required to dispose swiftly of criminal charges against an individual when no such charges are outstanding. For this reason the Court declined in *Marion* to apply the Speedy Trial Clause to the period before formal accusation. It is the logical corollary of this conclusion that the protections of the Clause are equally inapplicable after criminal charges have been formally dismissed. At that point the individual no longer stands officially accused of wrongdoing, his liberty is in no way restricted, and there are no pending charges on which a speedy trial could be held.

B. The court of appeals' construction of the Speedy Trial Clause also would have significant adverse effects on the administration of the criminal law. It is not uncommon for charges to be dropped after arrest or indictment as a matter of prosecutorial discretion, either because the evidence at that stage may not be sufficient to establish guilt beyond a reasonable doubt or because of non-evidentiary considerations properly a part of the decision to prosecute. Such dismissals are beneficial to all concerned: the defendant is spared the emotional and financial cost of a trial, with its risk of conviction, while the government, the courts, and society in general are saved

the expense associated with an unnecessary or unwise utilization of the criminal justice system.

The incentive to follow this sound course would be substantially diminished if, by declining to prosecute a defendant once his speedy trial rights had been triggered by arrest or indictment, the government might forfeit its ability ever to bring the accused to trial. Congress has recognized as much in the Speedy Trial Act of 1974, 18 U.S.C. (Supp. V) 3161 *et seq.*, which expressly excludes from the computation of a defendant's speedy trial time any period of delay between the dismissal of an indictment or information by the government and the filing of a new charge against the accused for the same offense. 18 U.S.C. (Supp. V) 3161(h)(6). This rule advances the interests protected by the Speedy Trial Clause and, in our view, reflects the proper interpretation of the constitutional provision.

ARGUMENT

I. A PRETRIAL ORDER DENYING A DEFENDANT'S MOTION TO DISMISS AN INDICTMENT ON SPEEDY TRIAL GROUNDS IS NOT APPEALABLE BEFORE TRIAL

A. Introduction

The decision of the court of appeals to review respondent's speedy trial claim prior to trial is unprecedented. We are aware of only two other federal cases in which a defendant has sought pretrial appellate review of an order denying his motion to dismiss the indictment because of an alleged

violation of the Sixth Amendment right to a speedy trial, and in both instances the court of appeals held that it lacked jurisdiction to consider the claim prior to conviction. See *United States* v. *Bailey*, 512 F. 2d 833 (C.A. 5), certiorari dismissed, 423 U.S. 1039; *Kyle* v. *United States*, 211 F. 2d 912 (C.A. 9).

The court below offered two grounds to justify its assumption of jurisdiction. First, it observed that respondent also challenged the district court's denial of his motion to dismiss the indictment on double jeopardy grounds, a matter the court had previously held to be a proper subject for interlocutory appellate review (see *United States* v. *Lansdown*, 460 F. 2d 164 (C.A. 4)), and that respondent's Sixth Amendment claim was "pendent" and "closely related" to the double jeopardy claim (Pet. App. 5a). But this rationale is vitiated by *Abney* v. *United States*, No. 75-6521, decided June 9, 1977, slip op. 11, which expressly held that the courts of appeals are without "pendent jurisdiction" over otherwise nonappealable claims even though they may be joined with a double jeopardy claim over which the courts of appeals do have interlocutory appellate jurisdiction. See also *United States* v. *Cerilli*, C.A. 3, No. 77-1200, decided July 15, 1977, slip op. 5-6.[13]

[13] The court of appeals' reliance on a theory of "pendent jurisdiction" is particularly difficult to accept in view of its failure to decide respondent's double jeopardy claim (Pet. App. 28a).

Alternatively, although conceding that "[n]ot every speedy trial claim * * * merits an interlocutory appeal" (Pet. App. 5a), the court of appeals believed that it could review the Sixth Amendment contention in this case because of its "extraordinary nature," in order to spare the district court and the parties "the burdens * * * of a prolonged, expensive trial * * *" (*id.* at 5a, 6a). This contention also is unpersuasive, however, because "[a]ppeal rights cannot depend on the facts of a particular case." *Carroll* v. *United States*, 354 U.S. 394, 405. The factual circumstances that underlie a speedy trial claim, however "extraordinary," cannot establish its independent appealability prior to trial. Under the controlling jurisdictional statute, 28 U.S.C. 1291, the courts of appeals have the power to review only "final decisions," a concept Congress defined "in terms of categories" (354 U.S. at 405).

Thus, whether the order rejecting respondent's motion to dismiss his indictment on speedy trial grounds is an appealable "final decision" depends upon whether such orders, "in the generality of cases" (*Carroll* v. *United States*, *supra*, 354 U.S. at 405), fall within that well-defined and narrowly circumscribed category of interlocutory orders for which the "costs of piecemeal review on the one hand [are outweighed by] the danger of denying justice by delay on the other." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 171, quoting from *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (footnote omitted).

B. The Denial Of A Motion To Dismiss An Indictment On Speedy Trial Grounds Is Not A "Final Decision"

This Court has recently reiterated that "there has been a firm congressional policy against interlocutory or 'piecemeal' appeals and the courts have consistently given effect to that policy." *Abney* v. *United States*, *supra*, slip op. 5.[11] Indeed, the Court noted, "[a]dherence to this rule of finality has been particularly stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law.'" *Ibid.*, quoting from *DiBella* v. *United States*, 369 U.S. 121, 126. See also *Cobbledick* v. *United States*, 309 U.S. 323, 324-326.

This Court has accordingly declined to permit interlocutory appeals from orders denying motions to suppress evidence (*Cogen* v. *United States*, 278 U.S. 221), rejecting claims of statutory immunity from prosecution (*Heike* v. *United States*, 217 U.S. 423), and refusing to dismiss an indictment for failure to state an offense (*Abney* v. *United States*, *supra*, slip op. 11) or for lack of jurisdiction (*Roche* v. *Evaporated Milk Association*, 319 U.S. 21). In each instance the Court stressed the absence of the statutory

[11] We have previously discussed the substantial historical underpinnings of this policy against interlocutory review in criminal cases (see pp. 19-37 of the government's brief in *Abney* v. *United States* (No. 75-6521), a copy of which we are providing to respondent), and we accordingly will not repeat this material here.

requirement of a "final decision" (28 U.S.C. 1291), which "in a criminal case means sentence." *Berman* v. *United States*, 302 U.S. 211, 212. See also *Parr* v. *United States*, 351 U.S. 513, 518. These same considerations govern here. The pretrial denial of a defendant's motion to dismiss an indictment on speedy trial grounds obviously is not "final," since it does not terminate the criminal proceedings in the district court; the ruling merely allows the case to proceed to trial, where a number of other factors may lead to a dismissal of the charges, or where, if the case goes to verdict, the jury may acquit. A speedy trial violation is merely one reason why there should be no judgment of conviction.

C. Pretrial Decisions Rejecting Speedy Trial Claims Are Not Within The "Collateral Order" Exception To The Final Judgment Rule

This Court has twice departed in criminal cases from the general prohibition against piecemeal appellate review, invoking on both occasions the so-called "collateral order" exception to the final judgment rule, first announced in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547. *Cohen* was a stockholder's derivative action brought in federal court because of diversity of citizenship. Before trial the question arose whether a state statute requiring the plaintiff to post security applied in federal court. The district court thought not, and the defendants immediately appealed; the court of appeals reversed and ordered the posting of security.

This Court concluded that the court of appeals had properly assumed jurisdiction to review the trial judge's ruling.

The Court began by reaffirming the settled principle that there can be no appeal before trial, "even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results" (337 U.S. at 546). It concluded, however, that an order to post security was a "final decision" within the meaning of 28 U.S.C. 1291.

First, the district court's order had fully disposed of the question of the applicability of the state security requirement in federal court; in no way had the trial judge's ruling left the matter "open, unfinished or inconclusive" (337 U.S. at 546). Second, the decision was not simply a "step toward final disposition of the merits of the case [which would] be merged in final judgment" (*ibid.*); to the contrary, the order had nothing to do with the substantive issues in the litigation and could not have been reviewed on appeal after trial. Finally, the decision involved an important right that would be "lost, probably irreparably" (*ibid.*), if review had to await final judgment; appellate review, to be effective, had to be immediate. In sum, the Court determined that the security order fell "in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" (*ibid.*).

Two years after its decision in *Cohen*, the Court applied the "collateral order" doctrine in a criminal proceeding, holding that an order denying a motion to reduce bail could be reviewed prior to trial. *Stack* v. *Boyle*, 342 U.S. 1. Concurring in the decision, Mr. Justice Jackson explained that, like the question of posting security in *Cohen*, "an order fixing bail can be reviewed without halting the main trial—its issues are entirely independent of the issues to be tried—and unless it can be reviewed before sentence, it never can be reviewed at all" (*id.* at 12). And again last Term, the Court held that the "collateral order" doctrine permits interlocutory appeal of orders denying a pretrial motion to dismiss an indictment on double jeopardy grounds. *Abney* v. *United States*, *supra*, slip op. 7. Such orders, said the Court, "constitute a complete, formal and, in the trial court, a final rejection of a criminal defendant's double jeopardy claim. There are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee" (*ibid.*). Moreover, "the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged" (*id.* at 8). And perhaps most important,

"the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence" (*id.* at 9). Although the protection against being twice convicted for the same crime could "be fully vindicated on an appeal following final judgment," the Court explained, the Double Jeopardy Clause also "protects an individual against more than being subject to double punishments. It is a guarantee against being twice put to *trial* for the same offense" (*ibid.*):

> Obviously, these aspects of the guarantee's protections would be lost if the accused were forced to "run the gauntlet" a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs. [*Id.* at 10.]

Like the denial of a motion to dismiss an indictment on double jeopardy grounds, a pretrial order rejecting a defendant's speedy trial claim plainly "lacks the finality traditionally considered indispensable to appellate review" (*Abney* v. *United States*, *supra*, slip op. 7). Hence, if such orders may be appealed prior to trial, it must be because they satisfy the restrictive qualifications identified in *Cohen* and *Abney* as sufficient to justify dispensing with the normal rules against piecemeal review before final judgment. As we now show, application of the various factors underlying the "collateral order" doctrine convincingly demonstrates that speedy trial contentions are not within that "small class" of claims that are wholly distinct and separable from the main action and that must be determined immediately if there is to be meaningful appellate review.

1. *Pretrial denial of a speedy trial motion does not constitute a "complete, formal and final rejection" of the claim in the district court*

The threshold requirement for application of the "collateral order" doctrine is "a fully consummated decision" in the district court. *Abney* v. *United States*, *supra*, slip op. 7. The Court found this requirement satisfied in the case of a double jeopardy claim because such a claim generally raises purely legal questions that are capable of a definitive resolution without awaiting introduction of the evidence at trial; in addition, once the claim is rejected, "[t]here are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee." *Ibid.*

The same cannot be said of the denial of a pretrial motion to dismiss an indictment on speedy trial grounds. Speedy trial issues necessarily depend for

their resolution upon a delicate assessment of the particular facts of each case. They therefore are ordinarily best considered in the context of the entire proceeding. Events at trial may demonstrate that a speedy trial claim, although initially denied, has substantial merit and should be reconsidered prior to or after verdict.

In *Barker* v. *Wingo*, 407 U.S. 514, the Court listed four factors that must be weighed in determining whether an accused has been deprived of his Sixth Amendment right to a speedy trial: the length of the delay, the reason for the delay, whether the defendant has asserted his right, and the prejudice to the defendant from the delay. *Id.* at 530. Of the kinds of prejudice that the speedy trial guarantee is designed to prevent—lengthy and oppressive pretrial incarceration, the anxiety and disruption of personal affairs caused by public accusation of criminal wrongdoing, and the possible impairment of the ability to present an effective defense at trial—"the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.* at 532.

Before trial, an appraisal of the degree to which post-accusation delay may have impaired defense capabilities often is extremely speculative. See *United States* v. *Ewell*, 383 U.S. 116, 122. Until the government's case has been presented and the precise evidence that the defendant must counter is known, the district court cannot intelligently determine whether

evidence claimed to have been lost as a result of the delay would have materially aided the defense. Evidence that appears vital prior to trial may assume diminished importance as the events at trial unfold; conversely, evidence whose value is debatable in advance of trial may become critical in light of the government's contentions. Prejudice once thought irreparable may also disappear if the evidence available to the defense, despite any trial delay that has occurred, is nonetheless sufficient to persuade the jury that the government has not proven the defendant's guilt beyond a reasonable doubt. Similar considerations apply to pretrial claims that the passage of time has dulled the memories of important defense witnesses. Not until the court has had an opportunity to observe the witness testify under oath at trial can it reliably conclude whether he in fact is unable to recall pertinent events and, if so, whether the lack of recall may fairly be attributed to the delay in commencing the trial.

In these circumstances, a district court's refusal in advance of trial to dismiss an indictment on speedy trial grounds (except perhaps on the rare occasions when the other factors in the *Barker* calculus by themselves conclusively establish a constitutional violation),[15] is always expressly or impliedly premised on the assumption that it would reconsider its ruling should the defendant's claim of prejudice be substantiated by the evidence or should unforeseen instances

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[15] See, *e.g.*, *Moore* v. *Arizona*, 414 U.S. 25, 26.

of prejudice to the defense materialize at trial. See, *e.g.*, *United States* v. *Roberts*, 548 F. 2d 665, 667 (C.A. 6), certiorari denied, No. 76-6299, May 23, 1977. Pretrial denial of a speedy trial claim thus can never be considered "a complete, formal and * * * final rejection" of the defendant's contention by the trial court; because of the unique nature of such claims, the matters preliminarily litigated in the motion to dismiss necessarily remain "open, unfinished [and] inconclusive" until the prosecution has run its course. *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*, 337 U.S. at 546.[16]

2. Speedy trial claims do not implicate matters wholly "separable from, and collateral to," the principal issue at the defendant's trial

Closely tied to the "threshold requirement of a fully consummated decision" is the requirement that the issue sought to be litigated on appeal before trial be divorced from the main cause of action. For example, the bail reduction order in *Stack* v. *Boyle*, *supra*, was wholly unrelated to the validity of the criminal charges pending against the defendant. So, too, was the double jeopardy claim in *Abney*, which was "completely independent of [the defendants'] guilt or inno-

[16] See *DiBella* v. *United States*, *supra*, 369 U.S. at 129, holding that an order granting or denying a pretrial motion to suppress evidence allegedly procured through an illegal search and seizure was not immediately appealable, because "the legality of the search too often cannot truly be determined until the evidence at the trial has brought all circumstances to light."

cence" (slip op. 8). As we have previously explained, however, the question of prejudice to the conduct of the defense, which is so often central to an assessment of a speedy trial claim, is inextricably bound to, and therefore cannot properly be considered in isolation from, the events at trial.

This Court's insistence that interlocutory appellate review be confined to claims that are "separable from, and collateral to," the matters to be resolved at trial serves the important purposes of avoiding piecemeal appeals or unnecessary appellate consideration of issues that may be merged in, or mooted by, the final judgment. Pretrial review of speedy trial claims would frustrate both goals.

A district court's rejection prior to trial of a motion to dismiss an indictment on speedy trial grounds is ordinarily not a "fully consummated decision," because the denial is, as noted above, always subject to reconsideration if (as is frequently the case) the evidence at trial permits a more informed judgment to be made. An appellate court obviously would be in no better position than the district court to determine before trial whether delay has materially harmed the defendant.[17] Moreover, because the absence of con-

[17] Thus, in assessing respondent's Sixth Amendment arguments in the absence of a trial record, the court of appeals was forced to speculate in a vacuum about the "potential memory loss" attributable to the delay, which it regarded (for reasons that, at a trial, might have proven frivolous) as "critical" to respondent's defense (Pet. App. 26a).

The importance of events at trial to allegations on appeal of unconstitutional pretrial delay is demonstrated by the fre-

crete proof of prejudice prior to trial should lead with few exceptions to an affirmance of the district court's denial of the dismissal motion, the courts of appeals would often be faced with the identical Sixth Amendment claim (albeit with a more detailed factual predicate) on appeal from a resulting conviction. Hence, allowance of interlocutory review in this situation, rather than facilitating a determination, once and for all, of legal issues thought too important and distinct to await the termination of the trial, would spawn duplicative litigation.

Even if the element of prejudice could be reliably determined in advance of trial in all cases, speedy trial claims would nevertheless not be sufficiently independent of the outcome of the trial itself to warrant pretrial appellate review, because such claims, if meritorious, would be vindicated by an acquittal resulting from the prosecution's failure to carry its burden of proof. This Court was persuaded that the double jeopardy motion in *Abney* was separable from the issues at trial because "[t]he elements of that

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quency with which this Court and the courts of appeals have relied on the trial record to decide such claims. See, *e.g.*, *Barker* v. *Wingo*, *supra*, 407 U.S. at 534; *United States* v. *Jackson*, 542 F.2d 403, 409 (C.A. 7); *United States* v. *Graham*, 538 F.2d 261, 265 (C.A. 9), certiorari denied, 429 U.S. 925; *United States* v. *Crow Dog*, 532 F.2d 1182, 1193-1194 (C.A. 8), certiorari denied, No. 75-1843, March 21, 1977; *United States* v. *Jones*, 524 F.2d 834, 852 (C.A.D.C.); *United States* v. *Gavic*, 520 F.2d 1346, 1349 (C.A. 8); *United States* v. *Baumgarten*, 517 F.2d 1020, 1025 (C.A. 8), certiorari denied, 423 U.S. 878; *Morris* v. *Wyrick*, 516 F.2d 1387, 1391 (C.A. 8), certiorari denied, 423 U.S. 925.

claim are completely independent of [an accused's] guilt or innocence" (slip op. 8). And so they were, since an acquittal would not have eliminated the defendant's grievance. By contrast, a principal, if not the predominant, interest served by the Speedy Trial Clause is the protection of the integrity of the fact-finding process at trial; the thrust of a defendant's Sixth Amendment claim in the usual case is that the passage of time has frustrated his ability to establish his innocence of the crimes charged.[18]

Only after the trial has taken place is that contention truly meaningful: if the defendant is acquitted, the claim is extinguished; if he is found guilty, the claim merges into the final judgment, can adequately be reviewed on appeal from the conviction, and (as we show below) can be fully satisfied by a reversal. In neither case can the claim be considered wholly

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[18] The courts have recognized this important distinction between double jeopardy and speedy trial claims in the disparate treatment accorded the contention that such claims are waived by a plea of guilty. While a guilty plea does not preclude subsequent assertion on appeal of a double jeopardy claim (*Menna* v. *New York*, 423 U.S. 61), since that claim is "not logically inconsistent with the valid establishment of factual guilt and * * * stand[s] in the way of conviction, [even] if factual guilt is validly established" (*id.* at 63, n. 2), it has been held that a defendant's formal admission of guilt waives defects such as the denial of a speedy trial. See, *e.g.*, *United States* v. *O'Donnell*, 539 F.2d 1233, 1236-1237 (C.A. 9), certiorari denied, 429 U.S. 960; *Speed* v. *United States*, 518 F.2d 75, 77 (C.A. 8), certiorari denied *sub nom. Camp.* v. *United States*, 423 U.S. 988; *Karcher* v. *Wainwright*, 476 F.2d 179, 180 (C.A. 5); *United States* v. *Mann*, 451 F.2d 346, 347 (C.A. 2).

separate and distinct from the main cause of action in the sense that it will not "affect, or * * * be affected by, decision of the merits of [the] case." *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*, 337 U.S. at 546. Rather, "it goes to the very heart of the issues to be resolved at the upcoming trial." *Abney* v. *United States*, *supra*, slip op. 12.

3. Speedy trial claims do not involve a right that would be "lost, probably irreparably," if review had to await final judgment

Even if a district court order constitutes a "fully consummated decision" on an issue that is "separable from, and collateral to" the main cause of action, pretrial appellate review is inappropriate unless the ruling involves "an important right which would be 'lost, probably irreparably,' if review had to await final judgment * * *." *Abney* v. *United States*, *supra*, slip op. 7. In the absence of such extraordinary circumstances, there is no justification for countenancing a breach of the beneficial rule against interlocutory appeals in criminal cases, with the substantial systemic costs that disregard of the rule inevitably entails. The double jeopardy claim in *Abney* satisfied this essential condition, because that constitutional guarantee "assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense" (*id.* at 9-10). Therefore, "if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the

clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs" (*id.* at 10; emphasis in original).

Loss or impairment of the right to a speedy trial, on the other hand, can never be attributable to the unavailability of pretrial appellate review of the claim. Unlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not encompass a "right not to be tried," which must be upheld prior to trial if it is to be enjoyed at all. It is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial. If the pertinent factors coalesce to deprive an accused of his right to a speedy trial, that loss has occurred before the claim is aired in any tribunal. While it may not be possible to identify with precision at what point the loss occurs, by definition it must occur *before* trial. Accordingly, proceeding with the trial would not cause or compound the deprivation.

Of course, an accused who successfully establishes a speedy trial claim prior to trial will not be tried. But this fact does not suggest that the Speedy Trial Clause embodies a prohibition against the trial itself. While the Court has held that the remedy for a violation of a defendant's right to a speedy trial is dismissal of the charges (*Strunk* v. *United States*, 412 U.S. 434, 440), this has been because the damage from an unconstitutional pretrial delay is irreparable (and, hence, any trial held after such delay would be an academic exercise from which no valid con-

viction could result), rather than because proceeding with the trial would independently infringe rights protected by the Sixth Amendment. Indeed, the Court has acknowledged the imprecision of the dismissal remedy in speedy trial cases, observing that the sanction is "unsatisfactorily severe" but that "it is the only possible remedy." *Barker* v. *Wingo*, *supra*, 407 U.S. at 522. This is often the case. For example, a defendant who secures a pretrial dismissal because he was granted immunity from prosecution, his indictment is defective, or the only evidence against him was seized in violation of the Fourth Amendment, also escapes trial. But it cannot therefore be said that that defendant enjoys a "right not to be tried," which must be safeguarded by interlocutory appellate review. See *Abney* v. *United States*, *supra*, slip op. 11; *Cogen* v. *United States*, *supra*, 278 U.S. at 227; *Heike* v. *United States*, *supra*, 217 U.S. at 430.[19]

By the same token, the effectiveness of appellate review is not diminished by awaiting the outcome of the proceedings in the district court. No remedy, whenever offered, can undo or alleviate the oppressive pretrial incarceration or prolonged period of anxiety that an accused may have suffered between

[19] As we have explained in our brief in *Abney* (pp. 42-44), the conclusion that the Speedy Trial Clause creates a "right not to be tried," and requires recognition of a concomitant right to pretrial appellate review to assure that the Sixth Amendment guarantee is not abridged, would be illimitable, since numerous other constitutional rights are also enforced by dismissal of the indictment.

indictment and trial, while the interest in avoiding conviction based on lost evidence or dimmed memories can be fully protected by a reversal of any conviction procured after a period of unconstitutional delay.[20] See *Abney* v. *United States*, *supra*, slip op. 9 (the aspect of "the Double Jeopardy Clause [which] protects an individual against being twice convicted for the same crime * * * can be fully vindicated on an appeal following final judgment"). And as a sanction to deter government proscrastination in future cases, the dismissal remedy is effective regardless of when it is imposed. Thus, precluding immediate review of a rejected speedy trial claim "presents a question, not of rights, but of remedies." *United States* v. *Calandra*, 414 U.S. 338, 354.

It is no answer to these significant considerations to suggest, as did the court below (Pet. App. 6a), that a pretrial appellate determination of a defendant's speedy trial claim might eliminate the necessity to hold a time-consuming and expensive trial. This Court has never regarded the possible avoidance of a needless trial as a sufficient justification for departure from the final judgment rule. See *Parr* v. *United States*, *supra*, 351 U.S. at 519-520; *Cobbledick* v. *United States*, *supra*, 309 U.S. at 325-326. In *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, for example, the defendants in a criminal

[20] Indeed, appellate consideration of speedy trial questions prior to trial, rather than securing the interests protected by the Sixth Amendment guarantee, is far more likely to undermine those interests. See pp. 42-47, *infra*.

antitrust case pleaded that the district court lacked jurisdiction and that they were immune from prosecution. When the court rejected the plea, the defendants sought mandamus. This Court conceded that there may be enormous costs in taking part in a trial that never should occur, but it held that interlocutory review nonetheless was not allowed by statute (319 U.S. at 30):

> Respondents stress the inconvenience of requiring them to undergo a trial in advance of an appellate determination of the challenge now made to the validity of the indictment. We may assume, as they allege, that that trial may be of several months' duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable.

What is more, the court of appeals' rationale for permitting pretrial appeals obviously could not logically be limited to speedy trial claims, but would encompass any other motion to dismiss an indictment or motion in bar—and would therefore effectively eviscerate the final judgment rule.

D. Interlocutory Appeals From The Denial Of Speedy Trial Motions Should Be Especially Disfavored Because They Would Frustrate Rather Than Promote The Values Reflected In The Speedy Trial Clause

Our discussion to this point has shown that, applying the principles enunciated in *Cohen* and *Abney*, the denial of a motion to dismiss an indictment on speedy

trial grounds is not a "collateral order" that may be appealed prior to trial.[21] Even were this conclusion less clear, the important policy considerations that underlie both the Speedy Trial Clause and the statutory bar to piecemeal appeals in criminal cases strongly suggest that speedy trial motions are the least appropriate subject for interlocutory appellate review.

This Court has recognized that one of the principal reasons for its strict adherence to the doctrine of finality in criminal cases is that "[t]he Sixth Amendment guarantees a speedy trial." *DiBella* v. *United*

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[21] Although the court of appeals analyzed the delay between 1970, when the crimes in this case were committed and the military proceedings involving respondent were held, and January 1975, when respondent was indicted, in terms of Sixth Amendment principles, in our view the proper inquiry is one of due process under the Fifth Amendment. See pp. 63-70, *infra*. Proper designation of the claim, however, does not alter the appealability analysis. As the Court recently noted in *United States* v. *Lovasco*, No. 75-1844, decided June 9, 1977, slip op. 6, proof of actual prejudice is essential to a claim that pre-indictment delay has resulted in a deprivation of due process. Hence, motions to dismiss because of pre-indictment delay, like those based on the denial of a speedy trial, cannot intelligently be assessed prior to trial, and the district court's pretrial rejection of such claims does not meet *Cohen*'s "threshold requirement" of a fully consummated decision on a matter wholly independent of the merits of the case. See, *e.g.*, *United States* v. *Marion*, 404 U.S. 307, 326 ("Events of the trial may demonstrate actual prejudice but at the present time appellees' due process claims are speculative and premature"). Similarly, claims of pre-indictment delay would not be "lost, probably irreparably," if they had to await their resolution until after completion of the trial.

States, *supra*, 369 U.S. at 126. The Speedy Trial Clause fosters the compelling societal interest in the swift punishment of the guilty and the prompt exoneration of the innocent, an interest that would be severely compromised if every contested legal question arising in the course of a criminal proceeding could be resolved in a separate appeal before trial of the general issue. Evidence might be lost or memories might fade during the pendency of the appeal. Moreover, the period of pretrial incarceration for those defendants unable to post bail would be prolonged, and the anxiety suffered by defendants living under a cloud of unresolved public accusation would be intensified. See *Dickey* v. *Florida*, 398 U.S. 30, 37-38; *Klopfer* v. *North Carolina*, 386 U.S. 213, 221-226; *United States* v. *Ewell*, *supra*, 383 U.S. at 120.

Although some defendants might willingly risk these evils in the hope of securing a favorable result in the court of appeals, the Speedy Trial Clause "is generically different from any of the other rights enshrined in the Constitution" because it is as much designed to foster the interests of society in the expeditious disposition of pending criminal charges as to confer protection upon individual defendants. *Barker* v. *Wingo*, *supra*, 407 U.S. at 519-522. Indeed, the "societal interest in providing a speedy trial" exists not only separate from, but also "at times in opposition to, the interests of the accused." *Id.* at 519.

Delay may prejudice the prosecution's ability to prove its case (see *United States* v. *Avalos*, 541 F. 2d

1100, 1110 (C.A. 5)), it increases the cost to society of maintaining those defendants subject to pretrial detention, and it prolongs the period during which defendants released on bail may commit other crimes. See *Dickey* v. *Florida*, *supra*, 398 U.S. at 42 (Brennan, J., concurring). Excessive delay between accusation and conviction also undermines the efficacy of punishment as a deterrent to future crimes, threatens the chance for rehabilitation, and, in general, breeds widespread disrespect for the criminal justice system. *Barker* v. *Wingo*, *supra*, 407 U.S. at 519-521. In sum, delay—whatever its source—is inimical to the proper functioning of the criminal law; the Speedy Trial Clause guards both society and the accused against unjustified delays, and the final judgment rule is one of the principal mechanisms by which this speedy trial guarantee is enforced.

It would be ironic indeed if an exception to the strict rule against pretrial appeals in criminal cases were created for alleged violations of the right to a speedy trial. Experience suggests that most claims of unconstitutional pretrial delay will be correctly adjudicated in the district court. Some undoubtedly will not, but the price for ensuring the expeditious appellate vindication of a few erroneously rejected claims would be a lengthy delay in the overwhelming number of cases in which the defendants have appealed from proper denials of their Sixth Amendment motions. Some assertions of delay-caused prejudice between indictment and trial, validly rejected when first presented, would become self-fulfilling prophecies as

memories dim or important evidence is lost during the period necessary for review. And as this Court has noted (*Barker* v. *Wingo*, *supra*, 407 U.S. at 521), "[d]elay is not an uncommon defense tactic," since it not only postpones an eventual incarceration in many instances, but also frequently weakens the government's case—and it is the government that has the burden of proof. See *United States* v. *Ewell*, *supra*, 383 U.S. at 122-123.

There is, in addition, nothing so precise about the circumstances that will support an alleged abridgement of the speedy trial guarantee as inherently to limit the availability of the claim. See *Barker* v. *Wingo*, *supra*, 407 U.S. at 521-522, 530. Unlike a motion to dismiss on double jeopardy grounds, which at least requires a plausible showing that the defendant has once before been in jeopardy of federal conviction on the same or a related offense, there will in every case be *some* period between arrest or indictment and trial, during which time "every defendant will either be incarcerated * * * or on bail subject to substantial restrictions on his liberty." *Id.* at 537 (White, J., concurring). "Possible prejudice is inherent in any delay, however short * * *." *United States* v. *Marion*, 404 U.S. 307, 322.

It would be the rare defendant, therefore, who could not proffer a colorable speedy trial claim and, if pretrial appellate review of an adverse decision were permitted, obtain the delay that is often an important aspect of defense strategy. The inevitable interruption of proceedings in the district court would, in a large

number of cases, needlessly prevent the prompt disposition of criminal charges guaranteed by the Speedy Trial Clause—a guarantee designed as much to benefit society as the accused. Nothing in the Sixth Amendment or 28 U.S.C. 1291 requires that anomalous result. The prudent course is to minimize pretrial delay by requiring a defendant whose speedy trial motion has been denied by the district court to proceed to trial, not to encourage further delay by countenancing protracted interlocutory appeals.[22]

II. THE INTERVAL BETWEEN RESPONDENT'S ARREST BY THE MILITARY AND HIS SCHEDULED TRIAL DATE ON THE FEDERAL CHARGES DID NOT VIOLATE THE SIXTH AMENDMENT OR WARRANT DISMISSAL OF THE INDICTMENT

If the Court agrees with our submission that appellate resolution of respondent's speedy trial arguments must await review of the entire case, in the event that

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[22] Respondent's case graphically illustrates the point. Although the district court denied respondent's motion to dismiss in July 1975 and his trial was scheduled to begin on August 18, 1975, the court of appeals did not decide the speedy trial claim until January 1976 and did not deny a petition for rehearing until April of that year. The claim has yet to be finally resolved, some two years after respondent's trial would have ended but for the delay occasioned by the interlocutory appeal.

It is also safe to assume that the court below expedited its consideration of respondent's appeal because of what it viewed to be the "extraordinary nature" of this case (Pet. App. 5a). Presumably that treatment could not be accorded the large number of mundane speedy trial appeals that would surely follow from a holding that the courts of appeals have jurisdiction to entertain such claims.

respondent is convicted, the judgment of the court of appeals should be vacated and the case remanded. If, however, the Court concludes that the court of appeals had jurisdiction to entertain respondent's Sixth Amendment claim, it must then consider whether the court below properly determined that the pretrial delay in this case warranted dismissal of the indictment. We submit that the ruling of the court of appeals on that issue represents a serious misapplication of the Speedy Trial Clause of the Sixth Amendment.

As the court of appeals acknowledged (Pet. App. 12a), no significant delay, and certainly no delay approaching constitutional magnitude, occurred in this case between respondent's indictment in January 1975 and the date trial was scheduled to begin, in August 1975. The court's holding that respondent was deprived of a speedy trial therefore plainly rests on the premise that respondent's Sixth Amendment right attached in the spring of 1970, when he was arrested and his commanding officer preferred criminal charges against him pursuant to Article 30 of the Uniform Code of Military Justice, 10 U.S.C. 830 (Pet. App. 13a-17a), and that this right continued unabated until August 1975, even though the military charges were completely dismissed and respondent was released from all restraints on his liberty in October 1970 (*id.* at 17a-20a).

Hence, the court of appeals reached the incongruous—and unsupportable—conclusion that, in the four-year period between dismissal of the military proceedings and his federal indictment, respondent was

entitled to insist upon a prompt resolution of the charges against him, despite the fact that no such charges were pending during any part of that period. This result finds support in neither the language nor the policies underlying the Speedy Trial Clause.

Properly viewed, respondent's complaint is one of pre-indictment delay under the Due Process Clause of the Fifth Amendment. As Judge Craven observed in dissent, however, and as we elaborate below (see pp. 63-70, *infra*), dismissal of respondent's indictment also cannot be justified on this ground. The delay was in large part attributable to an intensive and painstaking investigation rather than to an attempt to gain a tactical advantage over the accused, and it did not result in any demonstrable prejudice to respondent's defense.

A. The Speedy Trial Clause Is Inapplicable To The Period When A Defendant Is Not Under Arrest Or Other Formal Public Accusation Of A Crime

1. *The Sixth Amendment speedy trial guarantee is designed to ensure the expeditious resolution of pending criminal charges*

a. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *." "On its face," as the Court noted in *United States* v. *Marion*, *supra*, 404 U.S. at 313, "the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution." The

history of the Speedy Trial Clause, which has been explored by this Court in the past and needs no extensive rehearsal here, confirms what its clear language suggests—that the constitutional guarantee of a speedy trial applies only when a criminal prosecution against an accused is underway. See *United States* v. *Marion*, *supra*, 404 U.S. at 313-320; *Klopfer* v. *North Carolina*, *supra*, 386 U.S. at 223-226. It is "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." *United States* v. *Marion*, *supra*, 404 U.S. at 320. See also *United States* v. *Lovasco*, No. 75-1844, decided June 9, 1977, slip op. 5; *Dillingham* v. *United States*, 423 U.S. 64.

The rationale for this consistent interpretation of the Speedy Trial Clause is not difficult to apprehend. After a person has been formally accused of a crime, he has a substantial interest in an expeditious disposition of the charges. Inordinate delay between accusation and trial may prejudice the defense, since exculpatory evidence may be lost, helpful witnesses may die, or memories may fade. But the defendant's concerns generally extend far beyond such speculative considerations to more concrete and immediate manifestations of harm. "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family

and his friends." *United States* v. *Marion*, *supra*, 404 U.S. at 320. Once the government has set the criminal process in motion, with these inevitable consequences, it assumes a duty, imposed by the Sixth Amendment, to bring the accused to trial with a minimum of delay.

These considerations obviously have little application to a period during which no formal criminal charges exist. Until arrest or indictment occurs, "a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer." *United States* v. *Marion*, *supra*, 404 U.S. at 321. And it of course makes no sense to require the government to dispose swiftly of criminal charges against an individual when no such charges are outstanding.

The constitutional guarantee of a speedy trial, therefore, is not engaged until formal accusation of a crime. It is the logical corollary of this conclusion that a defendant's Sixth Amendment rights also do not continue after a criminal proceeding has been terminated. Here, for example, once the military authorities determined in the fall of 1970 that there was insufficient evidence to warrant reference of the charges against respondent to court-martial, any interest protected by the Speedy Trial Clause that he had in securing a prompt trial on those charges was extinguished.[23] Respondent no longer stood officially

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[23] Before any charge may be referred to court-martial, it must be subjected to a thorough and impartial investigation

and publicly accused of any crime, nor was his liberty in any way restricted.[24] Moreover, whatever stigma attached to the public, official accusation presumably was eliminated by the equally public, and equally official, dismissal. Until the grand jury determined four years later, after its reinvestigation of the case, that there was probable cause to believe that respondent had committed the murders of his wife and children, there was no formal accusation of wrongdoing upon which respondent could have been tried. In these circumstances, to hold, as did

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conducted in accordance with Article 32 of the U.C.M.J., 10 U.S.C. 832. See note 7, *supra; Manual for Courts-Martial, United States* ¶ 34 (Rev. ed. 1969). The Article 32 investigation "operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges"; although "[i]t is judicial in nature," it is only "a preliminary proceeding, not a trial on the merits." *United States* v. *Samuels*, 27 C.M.R. 280, 286. Accord, *United States* v. *Cunningham*, 30 C.M.R. 402, 404. See also *Humphrey* v. *Smith*, 336 U.S. 695 (discussing the proceeding mandated by the 70th Article of War, 10 U.S.C. (1940 ed.) 1542, supplanted in 1950 by Article 32). Its functional counterparts in federal criminal procedure are the grand jury proceeding (see *MacDonald* v. *Hodson*, 42 C.M.R. 184) and the preliminary examination (Rule 5.1, Fed. R. Crim. P.). As noted in our petition (Pet. 18-19, n. 13), we have assumed for the purposes of this case that respondent was arrested in May 1970 and that his Sixth Amendment rights attached at that point, although Judge Craven's dissent casts considerable doubt on this conclusion (Pet. App. 34a-35a, 38a-40a).

[24] After dismissal of the charges, respondent was immediately permitted to resume his duties as a physician with the rank of captain until his honorable discharge for reasons of hardship in December 1970. Thereafter, respondent continued to practice medicine as a private citizen.

the court of appeals, that respondent's right to a speedy trial nevertheless continued to run between October 1970 and January 1975 is "to wrench the Sixth Amendment from its proper context." *United States* v. *Marion*, *supra*, 404 U.S. at 322.

The other courts of appeals that have confronted this issue have had little trouble in concluding that the Speedy Trial Clause does not extend to the period after charges against a defendant have been dismissed but before the same or related charges are reinstituted. In *United States* v. *Bishton*, 463 F. 2d 877 (C.A.D.C.), for example, the defendant was reindicted after the initial charge against him had been thrown out on jurisdictional grounds. The District of Columbia Circuit, relying on *Marion*, expressly declined to consider the interval between the dismissal of the first indictment and the return of the second in assessing the defendant's speedy trial claim, because "during this time [defendant] was a free man against whom no prosecution was pending." *Id.* at 891.

Similarly, in *United States* v. *Martin*, 543 F. 2d 577 (C.A. 6), certiorari denied, 429 U.S. 1050, the defendant had been charged with an offense in August 1972, but the charges were dismissed five months later. Defendant was reindicted in December 1974 for the same criminal activity, and he was tried and convicted in December 1975. Refusing to consider the interim between indictments in passing upon the defendant's contention that his right to a speedy trial had been violated, the Sixth Circuit observed: "The

Sixth Amendment right to a speedy trial does not attach until the formal charge, the trial of which is alleged to have been inordinately and prejudicially delayed, is made. * * * Because there was no indictment which could have been tried in the period between January 1973 and December 1974, we cannot say that a speedy trial was delayed during that time." *Id.* at 579 (citation omitted). The Tenth and Second Circuits also have expressed these views in rejecting speedy trial claims in situations analogous to this case. *United States* v. *Stoker*, 522 F. 2d 576, 579-581 (C.A. 10); *United States* v. *Flores*, 501 F. 2d 1356, 1359-1360 (C.A.2).[25]

b. Although the court of appeals recognized that the dismissal of the military charges in October 1970 freed respondent from formal public accusation and its attendant unfavorable consequences, it nevertheless held that respondent's speedy trial rights con-

[25] *Flores* involved an application of the district court's prompt disposition rules, rather than a direct holding on a constitutional speedy trial claim. However, the purpose of those rules is to implement the Sixth Amendment's speedy trial requirement (cf. *United States* v. *Marion, supra,* 404 U.S. at 318-319 and n. 10) and the court's analysis is fully applicable to an interpretation of the constitutional provision: "During this period [after charges had been dismissed, defendant] was not subject to any of the disabilities associated with being under arrest, the subject of a complaint or indictment, or in the midst of a criminal prosecution. He was under no more jeopardy than any other citizen, and the fact that he might have been under investigation has no more effect after the dismissal on the running of the * * * period [during which a trial must begin] than it would have had before his arrest, that is, none." 501 F.2d at 1359-1360.

tinued "during the interval between the termination of the Article 32 proceedings and his arrest after indictment" in January 1975 (Pet. App. 17a). This was so, the court said, because respondent "realized that the favorable conclusion of the Article 32 proceedings was not the end of the government's efforts to convict him. Prudence obliged him to retain attorneys at his own expense for his continuing defense. He remained under suspicion and was subjected to the anxiety of the threat of another prosecution" (*ibid.*; footnote omitted).

Respondent's position prior to his indictment, however, even assuming the accuracy of the court of appeals' description, was no different from that of any individual who, although not yet arrested or otherwise formally charged with a crime, is aware that he is the focus of an ongoing criminal investigation. The targets of such inquiries inevitably suffer anxiety at the prospect of prosecution at some future date and are often obliged to hire an attorney to defend their interests. Anxiety and public obloquy, or the incurrence of expenses attributable to legal difficulties, obviously do not depend upon formal accusation; an official investigation of wrongdoing that has not yet culminated in criminal charges may have a quite similar effect, especially if its progress is publicized.[26] But the "particular protections" (*United*

[26] Even for publicized targets of criminal investigations, however, the impact on job, family, friends, and personal finances is far less severe prior to formal accusation than after. Rumors that may surface concerning the identity of

States v. *Marion*, *supra*, 404 U.S. at 320) of the Speedy Trial Clause are not engaged by such circumstances. Cf. *Kirby* v. *Illinois*, 406 U.S. 682, 689-691; *Hoffa* v. *United States*, 385 U.S. 293, 309-310.

This much is settled by the Court's decision in *United States* v. *Marion*, *supra*, which involved an indictment in 1970 for fraudulent business practices that allegedly occurred from 1965 to 1967. The government's investigation of the fraudulent scheme, with its focus on the defendants, had been the subject of widespread publicity well before the criminal charges were formally brought: more than three years in advance of the indictment, a series of newspaper articles had identified the defendants in connection with the investigation and had revealed that a prosecution would soon be initiated, and two years prior to the indictment the defendants had been asked by the United States Attorney's Office to submit business records pertinent to the investigation.

The defendants moved to dismiss the charges, contending that the substantial delay between the alleged commission of the crime and the return of the indictment violated their Sixth Amendment right to a speedy trial. This Court disagreed. Although the Court did not deny that a putative defendant may

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potential defendants seldom will be as damaging to those persons as their arrest or indictment, which, because of its official status, will serve almost inevitably in the minds of some to transform any preexisting speculation into apparently justified suspicion. Anxiety in the usual case also is increased immeasurably by formal accusation—with its assurance of a criminal trial and the heightened prospect of conviction and punishment.

suffer harmful emotional and financial consequences by virtue of his status, it concluded that the protections of the Speedy Trial Clause do not come into play until those consequences relate to a formal criminal charge. "Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer." 404 U.S. at 321. No principled distinction can be drawn between respondent's position after the military had dismissed the charge against him for lack of evidence and that of the defendants in *Marion;* in neither case was there outstanding during the period of delay an official accusation on which a speedy trial could have been held.

Nor does *Klopfer* v. *North Carolina*, *supra*, on which the court of appeals relied (Pet. App. 18a-19a), suggest a different result. *Klopfer* presented the question whether authorities "may indefinitely postpone prosecution *on an indictment* without stated justification over the objection of *an accused* * * *." 386 U.S. at 214 (emphasis added). The unusual state procedure under scrutiny in that case permitted a prosecutor to enter a "*nolle prosequi* with leave" on any indictment that he did not wish to pursue immediately. Since the indictment was not discharged by the filing of the *nolle prosequi*, the statute of limitations remained tolled; hence, although the accused was released from custody, he remained vulnerable to prosecution on the same indictment at any time, at the option of the prosecutor.

This Court held that the North Carolina procedure violated the right to a speedy trial, because the suspension of the prosecution "indefinitely prolong[ed the] oppression, as well as the 'anxiety and concern accompanying *public accusation*'" (386 U.S. at 222, quoting from *United States* v. *Ewell*, *supra*, 383 U.S. at 120, emphasis added). Thus, as Judge Craven observed in dissent in this case (Pet. App. 37a), the distinction that the panel majority acknowledged between this case and *Klopfer*—"there, an indictment remained potentially effective during the period of delay; here [respondent] was not indicted until the end of the period" (*id.* at 18a)—was central to this Court's Sixth Amendment analysis in *Klopfer* and was the crucial factor that brought that case within the rule announced in *Marion* for determining the applicability of the Speedy Trial Clause. Nothing in *Klopfer* supports an extension of the speedy trial protection to the period when a defendant is not the subject of *any* criminal charges.[27]

[27] The court of appeals' erroneous inclusion of the period between October 1970 and January 1975 in its speedy trial calculations eliminates the need to challenge its analysis of the factors identified in *Barker* v. *Wingo*, *supra*, 407 U.S. at 530, since respondent has never contended that his Sixth Amendment right to a speedy trial was violated by the post-indictment delay standing alone (Pet. App. 12a). Assuming that the four years during which no charges were pending against respondent could properly be considered for Sixth Amendment purposes, however, we believe that the court of appeals erred in concluding that respondent was denied a speedy trial.

Although the length of the delay in this case was substantial, *Barker* (which involved a gap of more than five years between arrest and trial) indicates that that factor is insufficient by itself to establish a Sixth Amendment violation. Moreover, as we discuss below (see pp. 64-70, *infra*), respondent has failed to demonstrate either that the delay was wholly unjustified or that it resulted in prejudice to his defense. While respondent may have experienced anxiety in the aftermath of the crimes, such general allegations are entitled to little weight. See *United States* v. *Jackson*, *supra*, 542 F.2d at 409; *United States* v. *Graham*, *supra*, 538 F.2d at 265; *United States* v. *Saglimbene*, 471 F.2d 16, 18 (C.A. 2), certiorari denied, 411 U.S. 966. Anxiety is suffered by all defendants, and respondent's complaint appears less compelling than most: he did not stand publicly accused of wrongdoing during more than a few months of the period of delay, he was not incarcerated, and there was no significant disruption of his activities.

Finally, there is no basis for the court of appeals' statement that respondent "reasonably asserted his right to a speedy trial" (Pet. App. 24a). Indeed, the court's conclusion demonstrates the incongruity of a Sixth Amendment analysis in circumstances such as these. Respondent could not have asserted a right to be tried between October 1970 and January 1975, since no charges were then pending against him. Nor can the correspondence from respondent's counsel to the Department of Justice during 1973 and 1974 (A. 89-109) even be fairly characterized as a demand that respondent be indicted. These letters consisted either of neutral inquiries concerning the current status of the government's investigation or requests that the government halt its efforts to link respondent to the murders on the ground that the Article 32 inquiry had established his innocence.

2. *Extension of the Speedy Trial Clause to the period after charges against an accused have been dismissed would have a substantial adverse impact on administration of the criminal law*

It is not uncommon for criminal charges to be dismissed as a matter of prosecutorial discretion. Arrests may be made improperly or indictments obtained

prematurely; even when an arrest or indictment is proper, the government may decide not to pursue the case because subsequent and considered judgment reveals that the evidence (though satisfying the probable cause requirement) may not be sufficient to establish guilt beyond a reasonable doubt. And on other occasions, non-evidentiary factors, legitimately a part of the decision whether to prosecute, may indicate that a criminal proceeding would not be in the public interest. Cf. *United States* v. *Lovasco*, *supra*, slip op. 11. In such circumstances the accused is spared the financial and emotional burdens of a trial, with the risk of conviction, and the courts, the prisons, and the public are saved the expense associated with an unnecessary or unwise utilization of the criminal justice system.

The cost to society from such exercises of prosecutorial discretion has generally been thought minimal, since (assuming the statute of limitations has not expired) the government may always reassess a decision not to prosecute in light of additional evidence or other events. But the incentive to follow this sound course is significantly diminished if, by declining to pursue a case at the outset, the prosecutor would thereby risk forfeiting the government's right to try the accused at any time.

The consequence of a holding that a defendant's speedy trial rights, once triggered by arrest or indictment, continue to run despite a dismissal of the charges may therefore be the prosecution of individuals who would otherwise not be tried at all. Moreover, trials undoubtedly would result in some instances in acquittal of the guilty because of the government's inability in the short time available after an arrest to develop compelling proof of guilt. See *United States* v. *Lovasco*, *supra*, slip op. 9. Even if the prosecutor did decide to dismiss charges following an arrest in the hope that additional evidence could be developed, further investigation of the case would occur in a hurried atmosphere hardly conducive either to the accumulation of reliable evidence or to scrupulous adherence to constitutional standards.

For these reasons, the decision below represents poor policy as well as bad law. Congress has recognized as much in the Speedy Trial Act of 1974, 18 U.S.C. (Supp. V) 3161 *et seq.*, which was enacted "to give effect to the sixth amendment right to a speedy trial for persons charged with criminal offenses * * *." S. Rep. No. 93-1021, 93d Cong., 2d Sess. 1 (1974). Section 3161(d) of the Act permits the strict time limits imposed elsewhere in the statute to run anew if an indictment or information is dismissed on the defendant's motion, or if a complaint "is dismissed or otherwise dropped" prior to indictment, and the defendant is subsequently charged with the same offense.[28] Furthermore, for purposes of com-

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[28] Sections 3161(b) and (c) generally require indictment to occur within 30 days of arrest, arraignment to occur within 10 days of indictment, and trial to occur within 60 days of arraignment.

puting the time within which a trial must be held under the Act, Section 3161(h)(6) excludes any period of delay between the dismissal of an indictment or information on the motion of the government and the filing of a new charge against the accused for the same offense."

These rules intelligently advance the interests protected by the Speedy Trial Clause and, in our view, reflect the proper interpretation of the constitutional provision. When a charge dismissed at the behest of the prosecutor is later reinstituted, the time that has elapsed between the filing of the initial charge and its dismissal should be included in considering the defendant's right to a speedy trial on the second indictment. Thus, a prosecutor would be prevented from testing the limits of permissible pretrial delay, dropping the charges, and then starting with a clear slate by the simple expedient of recharging the same offenses. See S. Rep. No. 93-1021, *supra*, at 38. However, where, as here, the dismissal is not engineered by the prosecution, the permissible time for trial on the second indictment is measured from the date that the renewed charge is brought. And in no event is the period during which no charge is pending against the accused included in the speedy trial calculation.

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[29] These provisions generally embody recommendations of the American Bar Association. See American Bar Association, *Standards Relating to Speedy Trial* §§ 2.2(b), 2.3(f) (Approved Draft 1968).

B. The Pre-Indictment Delay In This Case Did Not Violate The Due Process Clause

The conclusion that respondent's rights under the Speedy Trial Clause of the Sixth Amendment have not been infringed does not indicate that the five-year period between the murders of respondent's family and his indictment for those offenses is beyond judicial scrutiny. As this Court observed in *United States* v. *Marion*, *supra*, 404 U.S. at 324, and *United States* v. *Lovasco*, *supra*, slip op. 6, and as Judge Craven noted in dissent below (Pet. App. 40a-41a), the proper inquiry in cases of pre-indictment delay is one of due process under the Fifth Amendment.

A lengthy delay prior to accusation violates the Due Process Clause if it causes actual prejudice to the defense and if the government's justification for the delay is inadequate. *United States* v. *Lovasco*, *supra*, slip op. 6-13. Although the court of appeals did not undertake this analysis, and although we continue to believe that the question of prejudice to the defense is best resolved after the trial has taken place,[30] only a brief recitation of the relevant facts is required to demonstrate that respondent could not sustain his burden of proving a due process violation in this case.

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[30] See Brief for the United States, *United States* v. *Lovasco*, *supra*, at 40-48, a copy of which is being sent to respondent.

1. *Respondent has not demonstrated actual prejudice to his defense because of the delay in accusation*

Proof of actual prejudice to the defense from a pre-indictment delay is an essential element of a due process claim. *United States* v. *Lovasco*, *supra*, slip op. 6-7. While a substantial period of time admittedly elapsed between the murders in February 1970 and respondent's indictment, this is not a case in which any prejudice from the delay is likely to have occurred. The government's case from the outset has consisted almost exclusively of physical evidence culled from the crime scene, the testimony of scientific experts interpreting that evidence, and the logical inferences to be drawn therefrom. The reliability of such evidence does not diminish with the passage of time, nor does the ability of defense experts to offer contrary interpretations of its significance.

Moreover, respondent is the only witness with first-hand knowledge of the crimes and his defense has therefore always hinged principally upon the credibility of his story rather than the testimony of others. Respondent has never claimed an inability to recall the events of the night in question; indeed, he has presented essentially the same version of those events from his initial interview on the morning following the murders to his appearances before the grand jury in 1974 and 1975. There are no missing or dead witnesses, and respondent has never claimed otherwise. Virtually every person with knowledge of the pertinent events was questioned at length dur-

ing the exhaustive pre-indictment investigations, and many of the important witnesses testified at the Article 32 hearing. All prior statements in the case have been transcribed and preserved.

The court of appeals' response to these arguments illustrates the speculativeness and illogic of its determination that respondent was seriously prejudiced by the pre-indictment delay. The prime example of prejudice suggested by the court was that, in the five years since the crimes took place, memories may have faded and "witnesses can no longer be expected to reliably recall details" (Pet. App. 25a)—a conclusion difficult to reach in any case in the absence of a trial, but also one without any factual support in this record. In addition, the court was concerned that "a detailed reconstruction of the murder scene" might not be possible at this late date (*id.* at 26a) and that, because most of the witnesses who were in the Army in 1970 have now been scattered around the country, "interviewing these witnesses before trial and insuring their presence at trial would be time-consuming and expensive" to respondent (*id.* at 25a). Whatever the validity of these latter assertions of prejudice,[31] neither is fairly attributable to an undue delay by the government, since each allegation would have

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[31] We question the significance of either factor. Hundreds of photographs of respondent's apartment were taken on the day of the crime, and the murder scene has remained intact to this day (see note 9, *supra*). Furthermore, the government has offered to provide respondent with the current addresses of all witnesses interviewed during the investigation (see Pet. App. 25a).

been equally true in June 1972, when the massive C.I.D. investigation was completed and when, according to the court of appeals, respondent could have been tried without violating his constitutional rights (*id.* at 21a).

It is of course impossible to discount entirely the possibility that respondent may have been materially prejudiced by the delay prior to his indictment, although we think that possibility is quite remote in view of the considerations outlined above. Events at trial may substantiate the court of appeals' fears. What *is* clear at this stage, however, is that the conclusory observations of the court below fall far short of establishing the "actual prejudice" required to warrant a dismissal of an indictment under the Due Process Clause.

2. The pre-indictment delay in this case was not the result of improper government conduct

Even if respondent were able to demonstrate concrete prejudice to his defense from the pre-indictment delay, that showing alone would not entitle him to relief. This Court held in *United States* v. *Lovasco*, *supra*, slip op. 6-7, that "proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." The Court explained the standards that govern an assessment of the reasons offered for pre-indictment delay (*id.* at 7):

> [T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. Judges are not free, in defining "due process," to impose on law enforcement officials our "personal and private notions" of fairness and to "disregard the limits that bind judges in their judicial function." *Rochin* v. *California*, 342 U.S. 165, 170 (1952). Our task is more circumscribed. We are to determine only whether the actions complained of—here, compelling respondent to stand trial after the Government delayed indictment to investigate further—violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions," *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935), and which define "the community's sense of fair play and decency." *Rochin* v. *California*, *supra*, at 173.

Measured against these principles, the delay in this case did not warrant dismissal of the indictment.

The overwhelming portion of the five years prior to respondent's indictment was spent in diligent efforts to solve a complex and bizarre crime. The period between February 1970, when the murders were committed, and October 1970, when the military charges against respondent were dropped, was consumed by the Army's initial exhaustive investigation and by the Article 32 inquiry that led to the dismissal. During the next 18 months, until June 1972, the C.I.D. engaged in a wholesale reinvestigation of the case, a course of action that the court of appeals conceded to be entirely understandable in light of the dismissal

of the charges against respondent for insufficient evidence (Pet. App. 21a). Indeed, a substantial part of this renewed inquiry was spent in attempting to locate the intruders that respondent alleged had committed the crimes as well as to document or dispel respondent's repeated allegations that the evidence gathered from his apartment was unreliable because of the misfeasance of the police who had first arrived on the scene (see, *e.g.*, A. 76).

Not until June 1972 was the C.I.D.'s 13-volume report submitted to the Department of Justice. Several more months were then required for Department of Justice personnel to digest the contents of the report and to suggest other potentially fruitful lines of inquiry. In response to requests by the Department, the C.I.D. forwarded supplemental reports on November 9, 1972, and August 30, 1973 (A. 87). After these additional reports were received, no significant progress in the investigation was made until May 1974, when it was determined to utilize the services of the F.B.I. and the grand jury in a final effort to sift through the evidence and to reach conclusions about the case. Once the grand jury was empaneled in August 1974, the investigation again proceeded with dispatch, culminating in respondent's indictment in January 1975.

Thus, the only period during which the five-year investigation essentially stagnated was the nine months between the Department's receipt of the final supplemental C.I.D. report and the decision to institute a grand jury investigation of the crime. The

court of appeals acknowledged that this delay was not designed to hamper respondent's defense (Pet. App. 20a), instead attributing it to "indifference, negligence, or ineptitude" (*id.* at 23a). Regardless of whether this latter characterization of the government's efforts is accurate, we believe that, for reasons we have discussed elsewhere,[22] the absence of a finding that the delay was undertaken in bad faith or to gain a tactical advantage over the accused is fatal to any claim that respondent was deprived of due process. The failure of the prosecution to have proceeded with the celerity deemed desirable in retrospect by the court of appeals does not offend "those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' * * * and which define 'the community's sense of fair play and decency.'" *United States* v. *Lovasco*, *supra*, slip op. 7 (citations omitted). After all, much of the delay in this case was concededly spent in exploring and re-exploring every avenue of inquiry, both favorable as well as unfavorable to respondent, so that an accusation concerning a particularly heinous crime would not be made unjustly. Delay in indictment motivated largely by those concerns is not in any sense unfair.

In sum, respondent has been charged by the grand jury with three serious crimes. To preclude prosecution of a defendant whose guilt may be capable of

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[22] See Brief for the United States, *United States* v. *Lovasco*, *supra*, at 13-16, 22-23, 32.

establishment beyond a reasonable doubt is a grave step. It should not be taken on the basis of judicial second-guessing of the quality of the investigation conducted by the executive branch or of speculative assessments of the possible prejudice to the accused. It can be justified only upon a showing that the delay in reaching a prosecutorial decision was fundamentally unfair and violated the defendant's right to due process of law. This Court has stated that "the applicable statute of limitations * * * is * * * the primary guarantee against bringing overly stale criminal charges." *United States* v. *Ewell, supra,* 383 U.S. at 122. See also *United States* v. *Lovasco, supra,* slip op. 5-6. The determination of Congress that an indictment for first-degree murder may be brought at any time (18 U.S.C. 3281) reflects the view that society's interest in convicting the perpetrator of that offense is so substantial that prosecution is not to be foreclosed regardless of the passage of time. In this case there is no constitutional impediment to that legislative judgment.

CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded with directions to dismiss respondent's appeal for want of jurisdiction. If the Court reaches the merits, it should reverse the judgment of the court of appeals.

Respectfully submitted.

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